

ELDON L. SMITH

IBLA 70-113

70-564

70-566

Decided April 18, 1972

Appeal from decisions (Arizona 1-69-1, Arizona 1-70-1, Nevada 5-70-1) denying issuance or renewal of grazing licenses or permits until payment of outstanding trespass damages has been offered.

Affirmed.

Grazing Permits and Licenses: Generally--Grazing Permits and  
Licenses: Appeals

When consideration of a denial to grant grazing privileges has become moot because of the expiration of the grazing season, the issue need not be resolved on appeal unless it will bear upon future awards, since grazing privileges for past seasons cannot be granted or past awards changed.

Grazing Permits and Licenses: Generally--Grazing Permits and  
Licenses: Trespass

Where an applicant for grazing privileges has failed to pay assessed damages for a grazing trespass which assessment has been affirmed by the Secretary of the Interior, a district manager properly conditioned approval of the applicant's application upon payment of his outstanding trespass damages. No license or permit will be issued or renewed until payment of any amount found to be due has been offered.

Res Judicata--Rules of Practice: Appeals: Generally

Where an appeal has been taken and a final Departmental decision has been rendered thereon, the principle of res judicata will operate to bar consideration of a new appeal arising from a later proceeding involving the same party, the same land, the same claim, and the same issues.

Administrative Procedure: Judicial Review--Courts-- Grazing Permits  
and Licenses: Appeals--Grazing Permits and Licenses:  
Trespass--Judicial Review--Rules of Practice: Appeals: Effect of

The filing of a court action to review a decision of this

Department does not automatically suspend the effect of the decision.

This Board, however, may order a suspension of the decision during the pendency of the court action if justice will thereby be served. If the action challenges the assessment of damages for a grazing trespass, unless the court orders otherwise, the grazing applicant's failure to pay the assessed damages will generally continue to serve as a bar to the issuance of any privileges to him until or unless the court finds the damages should not be assessed.

APPEARANCES: Eldon L. Smith, pro se.

#### OPINION BY MRS. THOMPSON

Eldon L. Smith has filed three separate appeals from three different decisions: one is by the Office of Appeals and Hearings, Bureau of Land Management, affirming a decision by a hearing examiner; the other two are by a hearing examiner. All of the decisions arose from initial decisions by a district manager denying his applications for grazing licenses until damages for a grazing

trespass have been paid. 1/ Since the issues involved in each appeal are common to the others, the appeals are consolidated for the purpose of this decision.

Appellant's contentions in these appeals are general and vague. Nevertheless, in this decision we shall attempt to make some order out of the confusion in his appeals to resolve the issues insofar as they may be gleaned from his statements.

The genesis of each appeal is in the Secretarial decision, Eldon L. Smith, A-30944 (October 15, 1968), which affirmed the assessment of trespass damages for a grazing violation. Appellant sought judicial review of the Secretary's decision by filing a complaint in the United States District Court for the District of Arizona. The District Court granted a motion to dismiss the complaint in an unpublished decision, Smith v. Hickel et al., Civil No. 69-245, on February 3, 1970.

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1/ Since the time each of the appeals was filed, the appellate procedure of the Department was reorganized. The Office of Appeals and Hearings was eliminated as an intermediate appeal office, and all appeals pending before it were transferred effective July 1, 1970, to the newly created Board of Land Appeals. Cir. 2273, 35 F.R. 10009, 10012 (June 18, 1970). The Secretary also delegated to the Board of Land Appeals the authority to adjudicate all cases pending before him. Id. Accordingly, each appeal has been transferred to the Board of Land Appeals.

The Arizona appeals originated from applications which appellant made for grazing privileges for the 1970 and 1971 grazing seasons on the Black Willow and Tasi Springs allotment of the Arizona Strip grazing district. This area was formerly part of the Pakoon Special Rule Area. However, the Special Rule was revoked and the district manager adjudicated grazing privileges pursuant to the Federal Range Code. Appellant had appealed this allocation of grazing privileges and the appeal was pending before the Secretary at the time he made application for the 1970 and 1971 grazing seasons. 2/

The district manager, in both of the Arizona decisions, partially granted appellant's applications, but conditioned his approval upon payment of the outstanding trespass damage as assessed by the Secretary's October 15, 1968, decision, supra. Where appellant had applied for grazing privileges in excess of the grazing capacity as determined by the district manager before the appeal on the Pakoon Special Rule Area adjudication had commenced, the district manager

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2/ The Board of Land Appeals, has since rendered a decision adjudicating grazing privileges in the Pakoon Special Rule Area. The Board held in Delbert and George Allan, Eldon L. Smith et al., 2 IBLA 35, 78 I.D. 55 (1971), that the award of grazing privileges by the Bureau of Land Management in the Special Rule Area was correct. While this decision was pending, Smith had sought review of the Office of Appeals and Hearings decision, in conjunction with his appeal of the Secretarial decision, Eldon L. Smith, supra, in the Federal District Court of Arizona. As previously noted, his suit was dismissed.

rejected the applications. In the second Arizona case, appellant was denied the opportunity to protest the adverse recommendation of the advisory board, because the same issues were involved in prior appeals and had been adjudicated previously.

Appellant, in successive years, appealed the decisions of the Arizona district managers to the hearing examiner. On the motion of the state director that appellant had not clearly and concisely set out the errors in his appeal, 43 CFR § 1853.1(d), now 43 CFR § 4.470(d), the hearing examiner dismissed the appeals.

Prior to the reorganization of the Department's appellate procedure, the first Arizona decision was reviewed by the Office of Appeals and Hearings, Bureau of Land Management. The second Arizona decision was transferred to this office for review.

In his appeal to the Office of Appeals and Hearings, appellant maintained that the hearing examiner erred when he did not consider whether he was entitled to a grazing license. He argued that an appeal suspends the effect of a decision from which it is taken pending final action on the appeal. 43 CFR § 1853.8(a), now 43 CFR

§ 4.477(a). He alleged that judicial review of the Secretary's decision, Eldon L. Smith, supra, which assessed trespass damages, had been prevented by delay tactics on the part of the United States' attorneys. He petitioned the Director for restoration of his privileges pending a final decision and judicial review of the issue.

The Office of Appeals and Hearings noted that appellant had an appeal pending before the Secretary from one of its previous decisions which involved parts of the area in controversy, i.e., the Pakoon Special Rule Area. Thus, it refused to reopen a matter it had previously adjudicated while an appeal therefrom was pending. Although appellant claimed that he was deprived of his grazing privileges while his appeal was being adjudicated, the Office pointed out that appellant's application had been approved for the established capacity of the land subject to payment of the outstanding trespass damages. It observed that there was no reason to grant privileges in excess of the established grazing capacity while an appeal was pending. It held that 43 CFR § 9239.3-2(d) precluded the issuance or renewal of grazing permits when payment had not been offered for the amount owing to the United States for trespass damages.

In the Nevada case, the district manager rejected Smith's application for grazing privileges until his grazing fine was paid. Smith's appeal from this decision was dismissed by a hearing examiner on the ground there was no justiciable issue.

Appellant's appeals from the district manager's decisions failed to specify clear grounds of error and any reasons pointing to factual issues warranting hearings in this case. Therefore, the action taken by the hearing examiner in dismissing his appeals was proper.

As far as can be determined from appellant's vague contentions in the appeals from the hearing examiner and Office of Appeals and Hearings' decisions, appellant seems to be raising two primary questions namely:

1. Does the failure to pay assessed damages for a grazing trespass constitute grounds to deny the issuance or renewal of a grazing license or permit?
2. Does an appeal suspend the effect of the decision from which it is taken pending final action on the appeal?



Before considering these questions, we note that when consideration of a denial to grant grazing privileges has become moot because of the expiration of the grazing season, the issue need not be resolved on appeal unless it will bear upon future awards, since grazing privileges for past seasons cannot be granted or past awards changed. W. Dalton LaRue, Sr., and Juanita S. LaRue, A-30391 (March 16, 1966).

The first question has bearing on future actions affecting the award of any grazing privileges to appellant. Therefore, it will be resolved. The second question raises an issue which warrants some clarification in view of the history of the actions taken here.

With respect to the first question concerning the effect of a failure to pay trespass damages, the Secretary has been delegated the authority to provide "\* \* \* for the protection, administration, regulation, and improvement of \* \* \* grazing districts \* \* \*." 43 U.S.C. § 315a (1970). Pursuant to this authority 43 CFR § 9239.3-2 has issued. It clearly provides that "[a] grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation \* \* \*." In particular, "[n]o

license or permit will be issued or renewed until payment of any amount found to be due the United States \* \* \* has been offered." 43 CFR § 9239.3-2(d).

We conclude that the district managers properly held, as did the Office of Appeals and Hearings, that no license or permit would be issued or renewed until payment of the outstanding trespass damages had been offered.

As to the second question concerning the effect of Smith's appeals, the district manager's decisions were rendered after there was a final administrative action on the appeal of assessed trespass damages by the Secretary's decision of October 15, 1968, Eldon L. Smith, supra.

Ostensibly, appellant's position is that because he sought judicial review of the Secretary's decision, it was improper for the district managers to condition his subsequent applications upon payment of the outstanding trespass damages. Actually, this question is now moot because appellant failed to gain any relief in his court action. We note that in each of these appeals, appellant appears to be trying to raise issues which have been adjudicated previously. Final action on the trespass damages has been taken

by the Secretary's decision, Eldon L. Smith, supra. Final action has been taken on the adjudication of grazing privileges of the Pakoon Special Rule Area by the Board of Land Appeals, Delbert and George Allan, Eldon L. Smith et al., supra. Judicial review of both these cases has been denied. The doctrine of res judicata bars consideration of appeals arising from later proceedings when the same parties, lands, claims, and issues are involved. Malvin Pedroli et al., 75 I.D. 63 (1968). Cf., The Dredge Corporation, 3 IBLA 98 (1971); United States v. J. S. Devenny, 3 IBLA 185 (1971), and cases cited therein. This bars further consideration of such issues.

For clarification, should a similar situation arise again, we shall offer a few comments concerning appellant's contention that it was improper for the district manager to condition allowance of grazing privileges on payment of outstanding trespass damages "during an appeal and before a judicial review or court action has been taken" or before the decision had been made immediately effective. He refers to regulation 43 CFR 1853.8(a) and (b), in effect when his appeals were taken. These provisions are now renumbered, with only minor changes to conform to the revised appellate structure in the Department, as 43 CFR 4.477(a) and (b) (1972). They provide that an appeal shall suspend the effect of the decision

from which it is taken pending final action on the appeal, and expressly that an appellant who was granted grazing privileges in the preceding year may continue to use such privileges pending final action on the appeal unless the decision appealed from is made immediately effective.

Since the Department rendered a final decision on the question of trespass damages, appellant cannot use these regulatory provisions to circumvent the effect of 43 CFR 9239.3-2(d), requiring the denial of grazing privileges until the fine is paid. An appeal from the denial of privileges based upon a final Departmental decision assessing the fine cannot serve to suspend the denial since it is based upon a matter already finally adjudicated within the Department. In other words, by dilatory appeal actions appellant cannot prevent this Department from its most practical means of assuring that the fine is paid. (See further discussion of this point, infra).

As to the court action, the regulations providing for the suspension of a decision pending an appeal, are only applicable where appeals are taken within this Department. They are part of the rules of practice governing appeal procedures within the Department. Once a final Departmental decision has been rendered deciding a matter under these provisions, there is no further suspension of the initial

decision which was the subject of the appeal. Therefore, the filing of a court action does not automatically suspend the effect of a decision. Congress, by 5 U.S.C. § 705 (1970), has expressly provided for certain relief from the effect of administrative actions pending judicial review. That provision provides that such relief may be granted by the administrative agency or a court in appropriate circumstances as follows:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, \* \* \* may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

By the discretionary authority granted by this statute or the general supervisory discretion of the Secretary, which may now be exercised by this Board, the effect of a decision may be suspended during the pendency of court action. We believe, however, that good reasons for such a suspension should be shown by the litigant in a request to the Department. Appellant here failed to show such reasons in these cases. Also, in determining whether justice requires the suspension of the effect of a decision, all factors bearing upon the particular factual situation may be considered.

We come now to the question of whether the institution of court proceedings to review a final decision of the Department assessing grazing trespass damages should be considered as barring further action by this Department based upon the assessment of such damages, and specifically whether this Department will refuse to grant privileges because of the failure to pay such damages. Unless a court so orders, we believe the answer should be that until and unless a court finds that such an assessment was improper and there is no trespass fine due and owed to this Department, a grazing applicant's failure to pay the assessed damages will serve as a bar to the issuance of any grazing privileges to him in similar circumstances to this case. The reason for this is very simple. This Department has an obligation to protect the federal range. Imposition of fines for trespass is a means of enforcing rules and regulations governing the use of the range. Grazing privileges may also be permanently reduced as a disciplinary measure if there are repeated trespasses. See Alton Morrell and Sons, 72 I.D. 100 (1965). To assure that payment of trespass fines is made, this Department has no practical recourse against the user except timely and expensive court action unless it withholds the granting of grazing privileges, which it may do under the discretionary authority of the Taylor Grazing Act, 43 U.S.C. § 315 (1970). A grazing applicant may pay the fines under protest and, thereafter, seek

judicial review of the assessment. If he is successful, the Government would refund the money paid under protest. He, therefore, will suffer no irreparable injury by paying the fine. If he is not successful, the matter is ended. We do not believe justice requires this Department to ignore its assessment of trespass damages where that assessment is challenged in a court proceeding.

Appellant has contended generally that he has been deprived of his Constitutional rights. There is no merit to this general, unsupported statement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions appealed from are affirmed.

Joan B. Thompson, Member

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We concur:

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Martin Ritvo, Member

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Douglas E. Henriques, Member

